IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-830

TRANS WORLD AIRLINES, INC.,
Cross-Petitioner,

—v.—

HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CROSS-PETITIONER TRANS WORLD AIRLINES, INC.

DUDLEY B. TENNEY
80 Pine Street
New York, New York 10005
Counsel for Cross-Petitioner Trans World Airlines, Inc.

Of Counsel:

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut 06515

PAUL W. WILLIAMS
IMMANUEL KOHN
MARSHALL H. COX, JR.
CAHILL, GORDON, SONNETT, REINDEL & OHL
80 Pine Street
New York, New York 10005

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Opinions Below

The decision of the United States Court of Appeals for the Second Circuit under review is reported at 449 F.2d 51 (A-2739 *et seq.*).* It affirmed decisions in favor of plain-

* Citations with the prefix "A-" are to volumes A-I through A-VII of the printed Appendix and those with the prefix "AX-" are to volumes AX-I through AX-VII of the printed Appendix of Exhibits, filed with this Court in Nos. 71-827 and 71-830; citations to "Doc." are to documents in the original record certified to this Court in Nos. 71-827 and 71-830 and not otherwise reproduced; those with the prefix "Tr." refer to pages of the stenographic transcript of the damage hearing before Special Master Herbert Brownell (Doc. 554); citations to "TWA Ex." are to the exhibits offered by TWA in the damage hearing. Citations to "Brownell Report" are to the Report of the Special Master (Doc. 508), a copy of which is bound into volume A-V of the printed Appendix following p. A-1966.

tiff Trans World Airlines, Inc. ("TWA") and against defendants Hughes Tool Company ("Toolco") and Raymond M. Holliday by the United States District Court for the Southern District of New York, reported at 308 F.Supp. 679 (A-2027 *et seq.*) and 312 F.Supp. 478 (A-2060 *et seq.*), which in turn had confirmed in its entirety and entered judgment upon a Report and Award by the Special Master, Hon. Herbert Brownell ("the Brownell Report") (A-1966).

Earlier decisions in the litigation include an opinion and order of the district court on May 3, 1963, directing entry of an interlocutory default judgment for TWA against the defendants, and a final judgment dismissing Toolco's counterclaims, reported at 32 F.R.D. 604 (A-317 *et seq.*); and a unanimous decision in TWA's favor in 1964, written by Chief Judge Lumbard, affirming the district court's May 3 decision in all pertinent respects, reported at 332 F.2d 602 (A-328 *et seq.*). Writs of certiorari to the court of appeals with respect to its 1964 judgments (A-324-27) were dismissed by this Court at the October 1964 Term, after full briefing and argument, as having been improvidently granted, 380 U.S. 248, 249 (1965) (A-2737-38).

Jurisdiction

The judgment of the court of appeals was entered on September 1, 1971. Defendants' petition for rehearing was denied on September 28, 1971 (A-2799). TWA's cross-petition was filed December 23, 1971, and was granted and consolidated for argument with defendants' petition in No. 71-827 on February 22, 1972, 405 U.S. 915. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provision Involved

Clayton Act, Section 4,
United States Code, Title 15:

"§ 15. *Suits by persons injured; amount of recovery.*

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (38 STAT. 731 (1914))

Questions Presented

1. Whether under Section 4 of the Clayton Act a plaintiff can recover, as an element of actual damages, interest on losses of revenue for the period commencing after those losses were experienced to the entry of final judgment (here the period between December 31, 1963 and April 14, 1970)?

2. Alternatively, whether in a suit in which the determination of the amount of damages was referred to a special master, whose award of damages was thereafter confirmed in all respects by the district court, a plaintiff is entitled to recover interest on the amount thus determined for the period from the date the master's report was filed to the date final judgment was entered (here the period from September 21, 1968 to April 14, 1970)?

3. Whether, in determining TWA's actual net loss attributable to defendants' unlawful activities, the Special

Master should have deducted from TWA's proven lost revenues a "cost of capital" based on the lower interest rates which defendants prevented TWA from securing rather than the higher rates which TWA incurred later?

4. Whether under Section 4 of the Clayton Act a successful plaintiff is entitled to recover, as a part of his "cost of suit," the expense of retaining experts to establish the amount of damages?

Statement of the Case

(Limited to Issues of TWA's Cross-Petition)

In this statement we will not attempt to set out fully the facts of the case as we view them; such a statement will be reserved for our brief on the issues raised by defendants' petition in No. 71-827. We set out here only the facts pertinent to a consideration of the narrow legal issues as to computation of damages, interest and cost of suit, which are raised by TWA's cross-petition in No. 71-830.

On June 30, 1961 TWA filed its complaint against defendants Howard R. Hughes, Hughes Tool Company ("Toolco") and Raymond M. Holliday (A-1 *et seq.*) in the Southern District of New York seeking treble damages pursuant to Section 4 of the Clayton Act.[1]

On August 31, 1961 the case was assigned for all purposes to District Judge Charles M. Metzner pursuant to Rule 2

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[1] TWA also sought equitable relief under Section 16 of the Clayton Act, 38 STAT. 737 (1914), 15 U.S.C. § 26, but this request became moot in 1966 when Toolco disposed of its interest in TWA at a profit of $452 million.

of the General Rules for the Southern District of New York (A-33), and from then on Judge Metzner continued in charge of the case.

Defendants obtained priority under the then practice in the Southern District of New York (A-2077) and conducted discovery of TWA for one and a half years. Then, on February 8, 1963, in defiance of the district court's order that Toolco produce Hughes for his deposition, pursuant to Toolco's undertaking to do so and following acceptance by Hughes of a witness subpoena (A-123-24), and also in defiance of several outstanding orders for the production of certain vital documents (A-133-36, A-304-05; A-2268-69, A-124-26, A-305-06), defendants formally and expressly refused, as the result of what they called a "business decision", to continue with pretrial or trial of the case (A-268-69).

On February 16, 1963 TWA filed its formal motion for a default judgment (Doc. 180). On May 3, 1963 the district court, pursuant to Fed.R.Civ.P. 37, entered a default judgment against defendants on TWA's complaint, directing that the amount of TWA's damages be determined by a special master (A-321). On the basis of Toolco's default, the district court also entered a judgment dismissing Toolco's counterclaims against TWA and certain other parties (A-323). Defendants were granted a permissive appeal under 28 U.S.C. § 1292(b) with respect to the interlocutory judgment of default upon TWA's complaint (A-2736), and Toolco appealed as of right from the final judgment dismissing its counterclaims. The court of appeals on June 2, 1964 unanimously affirmed the decisions of the district court in all respects presently material (332 F.2d 602, A-328 *et seq.*).

Petitions for certiorari were granted as to both appeals (379 U.S. 92, A-2737); after full briefing and oral argument, this Court on March 8, 1965 dismissed the writs as improvidently granted (380 U.S. 248, 249, A-2738). This Court thereby left standing both the final judgment dismissing Toolco's counterclaims against TWA and certain other parties, and TWA's interlocutory default judgment against defendants for an amount of damages which had yet to be determined.

After remand, and following the appointment of Hon. Herbert Brownell as Special Master, the damage hearing commenced. At the Special Master's direction TWA submitted all of its direct testimony in written form on May 2, 1966, and tendered its witnesses for cross-examination. This was one day short of three years after entry of the default judgment against defendants. The cross-examination of TWA's witnesses consumed nearly 9 months, and was followed by TWA's cross-examination of defendants' witnesses on the basis of their written reports, which consumed eight and one-half months. On March 27, 1968 TWA put in a short rebuttal case, and defendants' cross-examination on the redirect testimony took place on April 9, 1968. The damage hearing was then closed.

The Special Master's Report, totalling 323 printed pages, was filed on September 21, 1968. Mr. Brownell found that TWA had proved it suffered a loss in its 1959-1963 operating profits totalling $74.3 million as a consequence of defendants' conspiracy to restrain and monopolize and their attempt to monopolize. He found that these losses resulted from TWA's receiving too few jets too late and from the fact that it could not buy jets in 1959-1960 but was forced to lease them from Toolco. From that amount the Special

Master then deducted a "cost of capital" of $29 million (Brownell Report, pp. 158-67, 184-85, 322; A-1966). This sum was the amount of the interest which he determined that TWA would have had to pay on the additional capital investment necessary to purchase a 63-plane jet fleet on the schedule established by the testimony of its witnesses, including jets that defendants had denied TWA and jets which TWA had been required to lease from Toolco. In calculating this "cost of capital", the Special Master used interest rates of 6 per cent and 6.3 per cent (the rates he concluded TWA would have had to pay to borrow money in 1959 and 1960) and not the lower rates of 4 per cent to 4¾ per cent at which borrowings could have been arranged in 1955 and 1956 as alleged in the complaint (Complaint, pars. 23, 26-28, A-15-16).

By deducting the $29 million "cost of capital" from TWA's proven $74.3 million loss in operating profits, the Special Master derived a net operating loss of $45.3 million, to which he added the sum of $570,478.65, representing additional proven losses sustained by TWA through disruption of certain training operations. The Special Master thus found that, as a result of defendants' antitrust violations, as of December 31, 1963 TWA had been damaged in the total amount of $45,870,478.65 before trebling (Brownell Report, p. 322; A-1966). However, the Special Master declined to make a further award of interest as damages ("prejudgment interest"), concluding that such an award is not legally available in treble damage antitrust suits (Brownell Report, pp. 309-18; A-1966).

While defendants below challenged the amount of damages found by the Special Master, they have not, in their petition in No. 71-827, sought further review of that determination by this Court. It is now undisputed that TWA

suffered losses of at least $45,870,478.65 from the specific injuries alleged in the complaint.[2]

Approximately a year and a half was then occupied with the district court's review and confirmation of the damage award. In an opinion on December 23, 1969 Judge Metzner considered and overruled all of the objections to the Special Master's Report filed by defendants and by TWA, and confirmed the Report in its entirety (308 F.Supp. 679, A-2027 *et seq.*); in an opinion on April 13, 1970 he ruled upon TWA's application for its cost of suit including a reasonable attorney's fee (312 F.Supp. 478, A-2060 *et seq.*). In those opinions, he rejected TWA's contention that the Special Master had deducted too large a "cost of capital" in fixing TWA's net operating losses (308 F. Supp. at 694, A-2054-55), affirmed the Special Master's ruling disallowing prejudgment interest (308 F.Supp. at 696, A-2058-59), and rejected TWA's alternative claim for interest from the filing of the Brownell Report to entry of judgment (312 F.Supp. at 485, A-2072). Upon TWA's application for its cost of suit, Judge Metzner awarded TWA $7,500,000 as a reasonable attorney's fee and $336,705.12 as taxable costs. He held as a matter of law, however, that TWA was entitled to recover as its cost of suit only such of its reasonable and necessary out-of-pocket expenses in prosecuting the action (other than attorney's fees) as are normally recovered as taxable costs; he therefore denied the rest of TWA's claim for its actual expenditures, principally consisting of the fees and expenses TWA paid to its expert witnesses at the damage hearing (312 F.Supp. at

[2] Indeed, Toolco itself had asserted in its counterclaims filed early in 1962 that TWA had suffered losses of this magnitude as a result, *inter alia*, of late deliveries of jets and borrowings at too high interest rates (Toolco Answer, pars. 98-99, A-89-90).

485, A-2071-72). On April 14, 1970 Judge Metzner entered final judgment for TWA in the amount of $147,448,141.07 (A-2073).

Another year and a half was spent in briefing, argument and determination of appeals to the court of appeals. That court on September 1, 1971 handed down a unanimous opinion affirming the judgment of the district court in all respects (except for increasing the rate of interest on the judgment to 7½ per cent per annum from entry of judgment, in accordance with applicable New York law and 28 U.S.C. § 1961 (449 F.2d at 80-81, A-2796-97)).

Review in this Court will extend this case well into its twelfth year, with the first eleven years having been spent as follows:

Period from filing of complaint (6/30/61) to defendants' formal announcement of a "business decision" that they would not continue with pretrial or trial of the case (2/8/63)	1 yr. 7 mos.
Period from defendants' refusal to proceed (2/8/63) to entry of final judgment dismissing Toolco's counterclaims and entry of interlocutory judgment in favor of TWA for damages yet to be assessed (5/3/63)	3 mos.
Period from entry of judgments (5/3/63) to disposition of appeals in this Court (3/8/65)	1 yr. 10 mos.
Period from disposition of appeals (3/8/65) to the filing of the Brownell Report (liquidating TWA's damage claim) (9/21/68)	3 yrs. 6 mos.

Period from filing of Brownell Report (9/21/68) to entry of final judgment for TWA (4/14/70) ..... 1 yr. 7 mos.

Period of appellate review from entry of judgment (4/14/70) to June 30, 1972 .... 2 yrs. 3 mos.

At the damage hearing it was established that defendants' conduct resulted in losses of operating revenues to TWA which continued through the year 1963. As of December 31, 1963 the amount of these losses (after deduction of the cost of capital applied by the Special Master) aggregated $45,870,478.65. Defendants' responsibility to pay whatever damages might be determined to exist was settled on February 8, 1963 when Toolco announced its business decision to default—or, at the latest, on May 3, 1963, with the entry of a default judgment in TWA's favor. The more than six years to the entry of final judgment for TWA on April 14, 1970 is a period during which TWA was deprived through no fault of its own of the use of moneys which it would have had in hand, absent defendants' wrongdoing.

Summary of Argument

The care with which the Special Master weighed the evidence presented at the damage hearing is apparent in his 323-page Report. Both courts below in their opinions analyzed the record and the applicable law and concluded that the Special Master's determinations were in every instance sound and well supported. TWA is not challenging in this Court any of the findings of fact made below. The questions presented in TWA's cross-petition are specific, narrow questions of law and policy.

I. It is the general rule in federal cases that, where necessary to compensate the plaintiff fully for his injuries, interest may be awarded as an element of plaintiff's actual damages from the date when the damages were sustained to the entry of judgment. There is nothing in the language or legislative history of Section 4 of the Clayton Act to support the ruling of the court of appeals below that this general federal rule is inapplicable to private antitrust cases. The early federal cases support the discretionary award of such prejudgment interest. By denying the recovery of prejudgment interest as a matter of law, the Second Circuit below and the Seventh Circuit in *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971), have failed to give effect to the mandate of Section 4 of the Clayton Act that a private antitrust plaintiff recover threefold "the damages by him sustained."

II. If TWA is not entitled to prejudgment interest from the close of the period during which its operating losses were sustained to the entry of judgment, TWA is at least entitled to compensation for the delay between the initial determination of the amount of its damages by the court's Special Master and the entry of judgment thereon by the district court. That interest on a master's award subsequently confirmed should run from the date of the award has been firmly established by decisions of this Court for nearly a hundred years. *Illinois Central R.R.* v. *Turrill*, 110 U.S. 301, 303 (1884); *Tilghman* v. *Proctor*, 125 U.S. 136, 160-61 (1888); *Crosby Steam Gage & Valve Co.* v. *Consolidated Safety Valve Co.*, 141 U.S. 441, 458 (1891). Those decisions involved patent cases, but no statutory reason or policy ground exists for restricting the principle to such cases. As announced, the rule was one of general

applicability, and to deprive a successful antitrust plaintiff of its benefit violates the congressional policy expressed in Section 4 of the Clayton Act.

III. TWA's complaint includes specific well-pleaded allegations that defendants, in furtherance of their antitrust violations, prevented TWA from arranging financing for jet aircraft in 1955 and 1956, when its competitors were arranging financing at rates of 4 per cent to 4¾ per cent per annum. These allegations were admitted by defendants' default. In calculating the "cost of capital" to TWA of financing a full 63-plane jet fleet, the Special Master did not give effect to these allegations and instead charged TWA with interest at the rates of 6 per cent to 6.3 per cent which TWA paid when it borrowed money at a later date. The Special Master's failure to utilize the lower rates available in 1955 and 1956 permits defendants to profit by their own wrongdoing.

IV. By adhering to the analysis of Section 4 of the Clayton Act in *Straus* v. *Victor Talking Machine Co.*, 297 F. 791, 806-07 (2d Cir. 1924), the court of appeals has failed to recognize the mounting cost to private antitrust plaintiffs of expert witnesses essential to the successful proof of damages resulting from violations of the antitrust laws. The strained and illogical construction of Section 4 adopted by the court in *Straus* limits the recovery of "cost of suit" to that small portion of the antitrust plaintiff's actual and necessary out-of-pocket expenditures which are ordinarily awarded to any successful plaintiff as taxable costs without special statutory provisions. Such a construction makes the statutory phrase mere surplusage and does violence to the purpose and plain meaning of Section 4. The logical interpretation of the language which Congress chose is

that a successful antitrust plaintiff was intended to be specially favored by recovering the actual "costs of the litigation." *Cf. Hawaii* v. *Standard Oil Company of California,* 405 U.S. 251, 266 (1972).

ARGUMENT

I.

The decisions below erroneously excluded prejudgment interest from consideration as an element of damages under Section 4 of the Clayton Act.

Section 4 of the Clayton Act provides that a person injured by a violation of the antitrust laws "shall recover threefold the damages by him sustained." The court of appeals, affirming the decisions of the district court and the Special Master, held that, as a matter of law, the trier of fact in a private treble damage antitrust case does not have discretion to award interest upon the damages established from the last date when the harmful effects of the defendants' illegal activities were sustained (here December 31, 1963) to entry of judgment (here April 14, 1970) (449 F.2d at 80, A-2795).

This ruling misinterprets the plain words of Section 4 of the Clayton Act.

In this case, the period of time from December 31, 1963 to the entry of judgment was six years, three months and 14 days (or 6.28 years). During that period TWA was deprived of the money which it would have had but for defendants' wrongdoing and which, as part of TWA's earning base, would have strengthened the airline's weakened financial structure—the legacy of its captivity by defendants (Complaint, pars. 52(d) and 53(a), A-26). At the same time, defendants, who on February 8, 1963 had an-

nounced their readiness to pay such damages as TWA could prove (A-297), retained under their control, and invested as they saw fit, the funds necessary for such payment.

The general federal rule is that interest may be awarded as an element of damages, whether the claim is liquidated or unliquidated and whether it sounds in contract or in tort, where necessary to make the plaintiff whole for the injuries sustained because of the defendant's wrongdoing. *Miller* v. *Robertson,* 266 U.S. 243, 258 (1924) ("• • • when necessary in order to arrive at fair compensation, the court in the exercise of a sound discretion may include interest or its equivalent as an element of damages"); *Marshfield Steel Co.* v. *NLRB,* 324 F.2d 333, 338 (8th Cir. 1963) (award of back pay by N.L.R.B.); *Moore-McCormack Lines, Inc.* v. *Richardson,* 295 F.2d 583, 592-95 (2d Cir. 1961), *cert. denied,* 368 U.S. 989 (1962) (recovery of pecuniary loss under Death on the High Seas Act); *Norte & Co.* v. *Huffines,* 416 F.2d 1189, 1191-92 (2d Cir. 1969), *cert. denied,* 397 U.S. 989 (1970) (judgment in derivative suit for securities fraud).

The prime consideration in determining whether to include interest as damages is whether such interest would in fact be "compensatory." *Rodgers* v. *United States,* 332 U.S. 371, 373 (1947); *Norte & Co.* v. *Huffines, supra* at 1191. Where the plaintiff has been deprived of the use of a sum of money by the defendant's wrongdoing, the inability to use the money is a real injury resulting from the wrong, for which he is entitled to be compensated. *Louisiana & Arkansas Ry.* v. *Export Drum Co.,* 359 F.2d 311, 317 (5th Cir. 1966); *Petition of City of New York,* 332 F.2d 1006 (2d Cir.), *cert. denied,* 379 U.S. 922 (1964). *See also* J. D. Guilfoil, *Damage Determina-*

tion in Private Antitrust Suits, 42 NOTRE DAME LAW. 647, 655 (1967).

In state courts, too, on the basis of either case law or legislative enactment, the recovery of interest as damages in noncontract cases is commonly permitted, either as a matter of right or in the discretion of the trier of fact.[3] Writing in 1935, Professor McCormick said of the class of cases "where the sum claimed is neither 'liquidated' nor based on standardized valuation, but yet is pecuniary in its nature":

> "The earlier judges, with their distaste for interest upon unliquidated claims where the debtor cannot know the precise sum which the law will exact, frowned upon interest in this class of claims, but the marked tendency to-day is toward the allowance of interest in such cases." MCCORMICK ON DAMAGES, § 56, p. 222.

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[3] *See, e.g., as of right:* COLO. REV. STAT. ANN. § 41-2-1 (1963) (actions for personal injuries from date suit is filed); LA. REV. STAT. ANN. § 13:4203 (West 1968) (legal interest from date of judicial demand on damages "ex delicto"); Title 14, ME. REV. STAT. ANN. § 1602 (Supp. 1972) (all civil actions from date complaint filed); MICH. COMP. LAWS ANN. § 600.6013 (1968) (any money judgment in a civil action from date complaint filed); R. I. GEN. LAWS ANN. § 9-21-10 (Supp. 1971) (actions for damages in which there is a verdict or a decision for pecuniary damages from date of commencement of action); *Hobart* v. *O'Brien,* 243 F.2d 735, 745 (1st Cir.), *cert. denied,* 355 U.S. 830 (1957) (applying MASS. GEN. LAWS ANN. ch. 231, § 6(B) (1956), subsequently amended in respect not here pertinent (Supp. 1971), to negligence action for personal injury and property damage); *First Nat'l Bank of Hollywood* v. *American Foam Rubber Corp.,* 309 F. Supp. 545, 546 (S.D. N.Y. 1969) (applying New York law to counterclaim charging conspiracy to injure or destroy bankrupt's business—interest on lost profits from "outside date" of loss); *E. M. Fleischmann Lumber Corp.* v. *Resources Corp. Int'l,* 114 F. Supp. 843, 844-46 (D. Del. 1953), *aff'd,* 211 F.2d 204 (3d Cir. 1954) (applying Del. law—all tort cases generally, except for personal injury, defamation, etc.); *Hunt* v. *Ward,* 262 Ala. 379, 79 So.2d 20, 25-26 (1955) (property damage tort cases if standard by which to measure damages is fixed by law); *Farmers Ins. Exchange* v. *Henderson,* 82

The primary consideration should be fair compensation of the plaintiff for the full extent of his injury.[4]

Ariz. 335, 313 P.2d 404 (1957) (action for loss or destruction of going business—likened to conversion of property); *Crosby* v. *Kroeger,* 138 Colo. 55, 330 P.2d 958, 963 (1958) (personal injuries); *Bridenstine* v. *Iowa City Elec. Ry.,* 181 Iowa 1124, 165 N.W. 435, 439-40 (1917) (suit to recover damages for death due to defendant's negligence); *Pepin* v. *Beaulieu,* 102 N. H. 84, 151 A.2d 230, 235 (1959) (negligence action for personal injury and property damage—applying N. H. REV. STAT. ANN. § 524:1-b (Supp. 1971)); *Texas Co.* v. *State,* 154 Tex. 494, 281 S.W.2d 83, 89 (1955) (in recovery for torts against property, even though damages unliquidated, if they have become fixed at a definite time); *Fell* v. *Union Pac. Ry.,* 32 Utah 101, 88 P. 1003, 1005-06 (1907) (tort actions for injury to or destruction of property).

Discretionary: CAL. CIV. CODE § 3288 (West 1970) (in cases of oppression, fraud, or malice); MO. ANN. STAT. § 537.520 (1953) (in jury's discretion in actions for wrongful detention or conversion of property); S.D. COMPILED LAWS ANN. § 21-1-13 (1967) ("In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury"); VA. CODE ANN. § 8-223 (1950) (in action on contract or tort, from date fixed by jury); *Robert C. Herd & Co.* v. *Krawill Mach. Corp.,* 256 F.2d 946, 952-53 (4th Cir. 1958), *aff'd,* 359 U.S. 297 (1959) (applying Md. law—negligence action for damage to property); *Speed* v. *Transamerica Corp.,* 135 F. Supp. 176 (D. Del. 1955), *modified & aff'd,* 235 F.2d 369 (3d Cir. 1956) (action for fraud—Kentucky law applied to common law count and federal law applied to counts alleging SEC violations); *Kennedy* v. *Clayton,* 216 Ark. 851, 227 S.W.2d 934, 939 (1950) (damage to property); *Wells Laundry & Linen Supply Co.* v. *Acme Fast Freight, Inc.,* 138 Conn. 458, 85 A.2d 907, 909-10 (1952) (injury to property—damages unliquidated); *Marrazzo* v. *Scranton Nehi Bottling Co.,* 438 Pa. 72, 263 A.2d 336, 337 (1970) (negligent damage to property); *Pettingill* v. *Kelton,* 124 Vt. 472, 207 A.2d 245, 248 (1965) (negligently inflicted injury).

[4] *See, e.g., Robert C. Herd & Co.* v. *Krawill Mach. Corp., supra* at 953 (plaintiff compelled to expend large sums of money over a period of years as a result of defendants' wrongs would be denied full compensation if prejudgment interest was not recoverable); *E. M. Fleischmann Lumber Corp.* v. *Resources Corp. Int'l, supra* at 844 ("Adequate compensation is the fundamental principle of damages and the additional compensation for the detention of the damages, measured by the allowance as interest, is permitted in

At the time the Clayton Act was passed, the general federal rule, permitting the award of interest on a sum found due (even though unliquidated) from the time a plaintiff should have had the sum as an element of his actual damages, was already well established. *Eddy* v. *Lafayette,* 163 U.S. 456, 467 (1896) (negligent damage to property); *New Dunderberg Mining Co.* v. *Old,* 97 F. 150, 153-55 (8th Cir. 1899) (wrongful conversion of property); *Brent* v. *Thornton,* 106 F. 35, 38 (5th Cir. 1901) (illegal seizure and detention of property). The practice of awarding interest as damages in such a case long predated the adoption even of the Sherman Act. *Lincoln* v. *Claflin,* 7 Wall. 132, 139 (1868) (fraudulent obtaining of property).

It may be argued that the antitrust plaintiff's right to treble damages justifies restricting the computation of his actual damages more narrowly than might otherwise be

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order to make the awarded damages adequate in amount."); *Bridenstine* v. *Iowa City Elec. Ry., supra* 165 N.W. at 440 ("* * * where payment is resisted and the obligation is denied until the case has been prosecuted to final judgment after the lapse of months or perhaps years, an allowance of interest is quite essential to the accomplishment of full justice."); *DeLong Corp.* v. *Morrison-Knudson Co.,* 20 App. Div.2d 104, 105-06, 244 N.Y.S.2d 859, 861 (1st Dep't 1963), *aff'd,* 14 N.Y.2d 346, 200 N.E.2d 557 (1964) ("* * * in the case of intentional tort resulting in pecuniary injury measurable by economic standards and not involving personal injuries, interest must be added if the victim of the tort is to be made whole."); *Emery* v. *Tilo Roofing Co.,* 89 N.H. 165, 195 A. 409, 412-13 (1937) (liquidated-unliquidated distinction must give way to "* * * fundamental principle that damages in a given case should give full compensation for the loss sustained. * * * Where property has been wrongfully taken, detained, destroyed, or damaged and the owner thereby deprived of its use, full compensation may often require that judgment be given for an amount sufficient to put the owner in as good a position as he would occupy if payment had been made contemporaneously with the loss."); *Colonial Refrigerated Transp., Inc.* v. *Mitchell,* 403 F.2d 541, 555 (5th Cir. 1968) (applying Texas law: "The damages suffered by the loss of use of money are real damages").

appropriate, perhaps by analogy to decisions under state law which have denied interest where "exemplary" or "punitive" damages are awarded.[5] But the express statutory mandate of the Clayton Act requires trebling the "damages by him sustained", and nothing in the statute suggests that those damages should be subject to any special limitations or exclusions. Indeed, not a shred of legislative history that we are aware of even hints at an intention to change the general rules as to how the amount of actual damages should be determined.

In the only early reported cases on the point, the possibility of interpreting the treble damage provisions of the antitrust laws as precluding application of the principles of *Lincoln* v. *Claflin, supra,* does not appear to have occurred to the courts. It was assumed instead that a private antitrust plaintiff—like any other plaintiff—could recover prejudgment interest as damages. *See Thomsen* v. *Cayser,* 243 U.S. 66, 74, 88-89 (1917), in which this Court cited the fact that the jury had added interest to the damages as confirming that the verdict was not based on "supposititious profits" but on actual calculation. *See also United Mine Workers* v. *Coronado Coal Co.,* 258 F. 829, 846-47 (8th Cir. 1919), *rev'd on other grounds,*

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[5] *Riss & Co.* v. *Feldman,* 79 A.2d 566 (D.C.Mun.Ct.App. 1951) (interest not allowable on punitive damages except as additional punishment); *Schulte* v. *Louisville & N.R.R.,* 128 Ky. 627, 108 S.W. 941, 942-43 (1908) (dictum—no interest recoverable where exemplary damages allowed); *Rayonier, Inc.* v. *Polson,* 400 F.2d 909, 922 (9th Cir. 1968) (Washington treble damage statute for wrongful removal of timber is penal in character and must be strictly construed—no interest on award). A somewhat different approach is taken in *DeLaughter* v. *Borden,* 431 F.2d 1354, 1359 (5th Cir. 1970), which approves the allowance of prejudgment interest by the district court, limited to the single damage portion of a treble damage award for violation of a Louisiana milk marketing statute.

259 U.S. 344 (1922), which notes that *Thomsen* v. *Cayser* is a particular application of the rule of *Lincoln* v. *Claflin*, and holds that prejudgment interest (awarded by the district court in that case as a matter of law) should have been left to the jury as a matter of damages.

To support its contrary holding, the Second Circuit below relied principally on *Locklin* v. *Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971), which held that a private antitrust plaintiff is not entitled to recover interest as an element of his damages because the damages are trebled. The Seventh Circuit in *Locklin* cited no authority for this proposition and gave no explanation for rejecting the plaintiff's argument there that the general tort rule permitting interest as damages should apply.

The Second Circuit, on the other hand, did discuss briefly the reasons for reaching the same conclusion as the court in *Locklin*. In addition to asserting that trebling of the damages "will more than adequately compensate TWA for its injuries," the court below stated that it is reasonable to interpret congressional silence on the matter "as indicating that trebled damages are sufficient penalty and that interest need not be included" (449 F.2d at 80, A-2795). Like the court in *Locklin*, the court below did not explain what basis there is for rejecting the much more logical assumption that Congress intended by its silence to adopt the prevailing practice concerning the measure of damages available in tort actions.

In addition to the *Locklin* case, the court of appeals cited two decisions of this Court in other fields as authority for its holding: *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945), and *Rodgers* v. *United States*, 332 U.S. 371

(1947). These cases deal with two quite different statutory schemes, and in neither did this Court suggest that there was any overriding general principle to be applied.

The *Brooklyn Savings Bank* case involved a suit for back wages plus interest from the date when the wages were due under the Fair Labor Standards Act of 1938, which expressly provides in Section 16(b), 52 STAT. 1069 (1938), 29 U.S.C. § 216(b) (1970), for recovery of any unpaid wages plus "an additional equal amount as liquidated damages." Citing its earlier decision in *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572 (1942), that such "liquidated damages," which are geared to unpaid back wages, are intended to compensate for delay in payment for sums due under the Act—the delay which is compensated for in tort cases by prejudgment interest—this Court held that prejudgment interest should not be awarded in addition to such "liquidated damages." However, there is nothing in the language or history of Section 4 of the Clayton Act to indicate that the trebling of damages thereunder is intended to compensate for delay in payment or that it is intended to constitute "liquidated damages" in lieu of actual damages.

In the *Rodgers* case, this Court held that penalties payable to the United States under the Agricultural Adjustment Act of 1938, 52 STAT. 31 (1938), 7 U.S.C. § 1281 (1970), by a farmer who had exceeded his agricultural quota for cotton were most closely analogous to criminal fines, as to which it is well established that no interest is payable. Fines, of course, do not reflect a measurable loss suffered by the Government, and cannot reasonably be considered to be compensatory in the sense that the actual damages recovered by a private antitrust plaintiff, *i.e.*, "the damages by him sustained," are compensatory. 332

U.S. at 374. Therefore, since the language and purpose of Section 4 is so completely different from the statutes in *Brooklyn Savings Bank* and *Rodgers*, the interpretation given to those statutes by this Court is inapplicable to the Clayton Act, and neither case lends support to the decision of the Second Circuit below or that of the Seventh Circuit in *Locklin*.

The court below also indicated some reluctance to become involved in what it considered to be the "difficult and time-consuming inquiries" required to determine the amount of prejudgment interest to which TWA is entitled (449 F.2d at 80, A-2795). Without agreeing with the court's characterization, TWA is prepared, in order to avoid any possibility that such a problem might arise, to accept the following basis of computation, which is the most favorable to which the defendants might be entitled:

(1) The date from which the prejudgment interest is to run can be fixed at the latest possible date—that is, the last day when TWA has proved it was still suffering direct injuries from defendants' conduct, thus disregarding the fact that some of the proven losses were experienced as early as the first quarter of 1959. *Cf. Colonial Refrigerated Transp., Inc.* v. *Mitchell*, 403 F.2d 541, 554-55 (5th Cir. 1968). This latest possible date for the commencement of interest charges would be December 31, 1963.[6]

[6] TWA's expert Wemple testified that, since by the end of 1963 TWA had historically come within five aircraft of the full 63-plane fleet which it would have had but for defendants' wrongdoing, he had recommended that the computation of estimated changes in TWA's operating results not be continued beyond that point (AX-99-100; Wemple Tr. 4902). The period covered by the damage studies of TWA's experts was accepted by the Special Master as the proper period within which to examine the effects on TWA of the defendants' unlawful conduct (Brownell Report, pp. 79, 141-43; A-1966).

(2) The rate of interest can be fixed at the lowest arguably compensatory figure—that is, the lowest point reached by the prime rate during the entire period from the end of 1963 to 1970. This lowest possible rate would be 4½ per cent,[7] a rate which throughout the period was well below both the legal rate established in New York[8] and the actual cost to TWA of any of its borrowings.[9] The amount of prejudgment interest to which TWA is entitled can thus be computed as follows:[10]

TWA's proven losses:	$45,870,478.65
rate of interest:	.045
number of years (12/31/63 to 4/14/70):	6.28
$45,870,478.65 × .045 × 6.28 =	$12,962,997.26
	× 3 (trebling)
	$38,888,991.78

[7] The prime rate increased steadily during this period of time: 4½% in 1963, 4½-5% in 1964-65, 5-6% in 1966-67, 6-6¾% in 1968, and 7-8½% in 1969-70. 56 FED. RESERVE BULL., No. 12, p. A33 (December 1970).

[8] Under N.Y. GEN. OBLIG. LAW § 5-501 (McKinney 1964), the legal rate of interest was 6% per annum until July 1, 1968 when it was increased to 7¼%; it was then raised to 7½% effective February 16, 1969 (see note 14, p. 28 *infra*).

[9] TWA actually paid well above the prime rate on borrowings of over $160 million in 1963-66 (TWA Exs. 96-99). TWA continued to pay for its money at or above the prime rate throughout the rest of the period through 1970, as its annual reports, available to the public, demonstrate.

[10] An alternative calculation to reflect the fact that TWA is entitled to have its damage award increased as set forth in Point III *infra* is set out as Annex A at the end of this brief.

II.

Alternatively, the decisions below erroneously failed to allow interest on the Special Master's award for the period between the filing of his Report and the entry of judgment.

If this Court should hold that TWA is not entitled to prejudgment interest from the last date when it directly sustained damages as a result of defendants' wrongdoing until the entry of judgment, as set forth in Point I above, then TWA is still entitled to the compensation for delay which is customary in cases where the determination of damages is referred to a master and the master's award is subsequently confirmed by the district court—*i.e.*, TWA should receive interest from the filing of the Brownell Report to the entry of judgment confirming that Report. By denying TWA this compensation for delay, the district court (312 F.Supp. at 485, A-2072) and the court of appeals (449 F.2d at 80, A-2795-96) accorded to defendants for that 19-month period the interest-free use of money to which TWA had been judicially determined to be entitled. *Tilghman* v. *Proctor*, 125 U.S. 136 (1888).[11] This de-

[11] In *Tilghman* v. *Proctor*, a patent infringement case, the Court first noted that, under existing prior decisions, the plaintiff's claim was one for "unliquidated damages, which, as a general rule, and in the absence of special circumstances, do not bear interest until after their amount has been *judicially ascertained* • • •" (125 U.S. at 160; emphasis added). It went on to say:

"Nothing is shown to take this case out of the general rule. At the time of the infringement, the fundamental questions of the validity and extent of Tilghman's patent were in earnest controversy and of uncertain issue. *Interest should therefore be allowed, as in Illinois Central Railroad* v. *Turrell, just cited, only from the day when the master's report was submitted to the court* • • • upon the amount shown to be due by that report and the accompanying evidence." (125 U.S. at 161; emphasis added.)

nial placed upon TWA the entire cost of the delay from referring the question of damages to a special master.

Some delay is virtually inevitable whenever the question of damages is referred to a special master, particularly in a complex private antitrust action, since—whatever the gain in judicial efficiency—an additional layer of judicial review is involved, and that takes time. In this case it took one year and seven months. The policy underlying Section 4 of the Clayton Act can be completely effectuated only by minimizing the adverse impact of such a delay upon the plaintiff. However necessary the reference may be in such a case, this necessity arises not from anything done by the plaintiff, but from defendants' wrongdoing for which Section 4 is intended to provide a remedy.

This Court has previously expressed its concern that parties not be unnecessarily penalized by references to masters. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 256 (1957); *Los Angeles Brush Mfg. Corp.* v. *James*, 272 U.S. 701, 707 (1927). There is no logical reason why such a delay should operate to the monetary prejudice of the plaintiff when there is available the simple solution of allowing interest on any sum found properly awarded from the date of filing of the master's report. This is exactly what federal courts have done for very many years in judgments entered on special masters' awards, where interest has not been awarded from an earlier date as an element of damages. *See, e.g., Illinois Central R.R.* v. *Turrill*, 110 U.S. 301, 303 (1884); *Tilghman* v. *Proctor, supra; Crosby Steam Gage & Valve Co.* v. *Consolidated Safety Valve Co.*, 141 U.S. 441, 458 (1891); *L. P. Larson, Jr., Co.* v. *William Wrigley, Jr., Co.*, 20 F.2d 830, 836 (7th Cir. 1927), *rev'd in part on other grounds*, 277 U.S. 97 (1928); *Carter Products, Inc.*

v. *Colgate-Palmolive Co.*, 214 F.Supp. 383, 417-18 (D.Md. 1963). The fact that most of these were patent cases is reflective only of the long-standing utilization of references to special masters in patent cases. There is nothing peculiar to patent infringement suits nor any basis in the historical development of the applicable statutes that would justify confining the rule to patent cases.[12] It was originally announced as a rule of general applicability, and it should apply whenever the assessment of damages is referred to a special master and the master's award is subsequently confirmed by the district court. This Court said as much in discussing the rationale for the rule in the *Crosby Steam Gage & Valve Co.* case, *supra*:

> "Delay caused by the court, or not attributable to the plaintiff, in coming to a conclusion on the master's report, where the amount found by that report is confirmed, ought not to deprive the plaintiff of interest on the amount found by the master. Under such circumstances, the account ought to be considered as liquidated on the day when the master's report is filed." (141 U.S. at 458).

We know of no reason for refusing to apply a similar rule to the master's award in a private treble damage case.

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[12] At the time of this Court's decisions in the *Illinois Central R.R.*, *Tilghman* and *Crosby* cases, the pertinent statutory provisions spoke only of "actual damages sustained" and "the damages the complainant has sustained." Revised Statutes of 1874, Section 4919 and Section 4921. No mention was made therein of interest from the filing of the master's report. The first reference to interest of any kind was inserted in Section 4921 by Act of August 1, 1946, ch. 726, § 1, 60 STAT. 778, which provided for "general damages * * *, not less than a reasonable royalty therefor, together with such costs, and interest, as may be fixed by the court." The House Committee Report indicates that the reference to interest in the 1946 amendment was intended to require the award of interest "from the time infringement occurred." H.R. REP. No. 1587, 79th Cong., 2d Sess., 1946 U.S. CODE CONG. & ADMIN. NEWS, p. 1387.

A similar practice is established in New York, where N.Y. CPLR § 5002 (McKinney 1963) mandates the recovery of interest "in any action, from the date * * * the report * * * was made to the date of entry of final judgment." In *In re Kavares (Motor Vehicle Accident Indemnification Corp.)*, 29 App.Div.2d 68, 70-71, 285 N.Y.S.2d 983, 987 (1st Dep't 1967), "report" in § 5002 was held to include the final award of an arbitrator determining the amount of compensation under the Motor Vehicle Accident Indemnification Corporation Law, N.Y. INS. LAW §§ 600-26 (McKinney 1966). *See also* ILL. ANN. STAT. ch. 74, § 3 (Smith-Hurd Supp. 1972); IOWA CODE ANN. § 625.21 (1950); *Aronson* v. *Orlov*, 228 Mass. 1, 116 N.E. 951, 955, *cert. denied*, 245 U.S. 662 (1917) (applying predecessor of MASS. GEN. LAWS ANN. ch. 235, § 8 (1956)); MINN. STAT. ANN. § 549.09 (1947); S. C. CODE ANN. § 10-1605 (1962); WIS. STAT. ANN. §271.04 (4) (Supp. 1972-73).

The court of appeals did not find it necessary to give any reason for departing from this established practice because it considered the question to be one of interest on a federal money judgment (449 F.2d at 80, A-2795), which under 28 U.S.C. § 1961 *must* run from the date of entry of the judgment at the rate prescribed by state law.[13]

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[13] The court of appeals distinguished the cases cited by TWA on the ground that they were concerned with the award of interest *as damages*, which it held unavailable as a matter of law in antitrust cases (449 F.2d at 80n.5, A-2796); *see* discussion in Point I *supra*, especially pp. 19-21. This distinction, however, is unavailable in light of the discussion in *Crosby Steam Gage & Valve Co.*, *supra*, which rests the practice of awarding interest on a master's report, subsequently confirmed, squarely on the policy of avoiding prejudice to a plaintiff from the delay involved in a reference.

The suggestion that 28 U.S.C. § 1961 affirmatively *precludes* interest prior to the entry of judgment by the court is of course untenable in light not only of *Tilghman* v. *Proctor* and *Crosby*

The court of appeals appears again to be following the Seventh Circuit's decision in *Locklin* v. *Day-Glo Color Corp.*, discussed in Point I, p. 19 *supra*. On the basis of an erroneous ruling that interest "not enumerated as a recoverable item in the statute * * * is therefore precluded" (429 F.2d at 877), the Seventh Circuit held that interest cannot be recovered from the date of the master's award since Section 4 of the Clayton Act makes no provision for interest and 28 U.S.C. § 1961 applies only to interest from the entry of a final judgment. This Court's decision in *Rodgers* v. *United States*, 332 U.S. 371, 373 (1947), directly refutes this proposition:

> "* * * the failure to mention interest in statutes which create obligations has *not* been interpreted by this Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest." (Emphasis added.)

Both the Second Circuit below and the Seventh Circuit in *Locklin* fail to deal with the equitable principle embodied in *Tilghman* v. *Proctor, supra,* and the cases following it, that a successful plaintiff should, as a matter of course, be compensated for the delay between the determination of the amount of his damages by the special master whom the court has appointed and the entry by the court of judgment thereupon.

A private antitrust plaintiff is as entitled to the benefit of this equitable principle as are patent, trademark and

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Steam Gage & Valve Co. but also of *Miller* v. *Robertson, supra*, *Lincoln* v. *Claflin, supra,* and innumerable other cases which have allowed such interest in a broad variety of situations ever since the substance of 28 U.S.C. § 1961 was enacted in the Act of August 23, 1842, ch. 118, § 8, 5 STAT. 518, subsequently codified in Revised Statutes of 1874, Section 966.

copyright plaintiffs, who are accorded it as a matter of course. The congressional policy expressed in the Clayton Act requires, indeed, that defendants found to have violated the antitrust laws should not be permitted to retain the fruits of their wrongdoing. *International Boxing Club* v. *United States,* 358 U.S. 242, 253 (1959); *Schine Chain Theatres, Inc.* v. *United States,* 334 U.S. 110 (1948). To leave a plaintiff uncompensated for such additional delay in his recovery would appear inconsistent with that policy.

The amount of interest to which TWA is entitled may be calculated, in the absence of a federal statute, with reference to the law of the state in which the district court sits. *See Royal Indemnity Co.* v. *United States,* 313 U.S. 289, 297 (1941); *Collier* v. *Granger,* 258 F.Supp. 717, 719 (S.D.N.Y. 1966). Under N.Y. CPLR §§ 5002, 5004 (McKinney 1963), interest from master's report to judgment would be calculated at the legal rate, which during the 19-month period in question rose from 7¼ per cent to 7½ per cent.[14] Therefore, the interest may be determined according to the following computation:

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[14] Under N.Y. GEN. OBLIG. LAW § 5-501(1) (McKinney Supp. 1971), as amended in 1968, the legal rate of interest in New York is that set by the State Banking Board. *Rachlin & Co.* v. *Tra-Mar, Inc.,* 33 App.Div.2d 370, 308 N.Y.S.2d 153 (1st Dep't 1970). Effective July 1, 1968, the Board set the rate at 7¼%, Regulation No. 37, 3 N.Y.C.R.R. § 34.1 (1968). Subsequently the rate was increased to 7½% effective February 16, 1969, General Regulation, Part 4, 3 N.Y.C.R.R. § 4.1 (1969). During its 1972 session the New York State Legislature enacted Assembly Bill No. A10477 (1972 NEW YORK LEGISLATIVE RECORD & INDEX, vol. I, p. A669) which amends N.Y. CPLR § 5004 to change the rate of interest on verdicts, reports and decisions (as provided for in N.Y. CPLR § 5002) from "the legal rate" to "six per centum per annum." The amendment was signed into law by the Governor as Chapter 358 of the Laws of 1972, and will go into effect on September 1, 1972. N.Y.L.J., May 26, 1972, p. 1, col. 6.

Total award of Special Master:	$137,611,435.95
Number of years at rate of 7¼% (9/21/68 to 2/15/69):	.40
Number of years at rate of 7½% (2/16/69 to 4/14/70):	1.16
$137,611,435.95 × .0725 × .40 =	$ 3,990,731.64
$137,611,435.95 × .075 × 1.16 =	$ 11,972,194.93
	$ 15,962,926.57

III.

The decisions below should have determined TWA's net damages on the basis of a "cost of capital" established by the allegations of the complaint that defendants wrongfully precluded borrowings at lower interest rates.

The Special Master found that, when TWA received too few jets too late (47 instead of 63, with delays of up to 11 months) (Brownell Report, pp. 51-57, 151-53; A-1966) and was compelled to lease jets from Toolco in 1959-1960 instead of purchasing them directly (Brownell Report, p. 182; A-1966), TWA suffered losses in operating profits totalling $74.3 million (Brownell Report, p. 322; A-1966). The complaint establishes that defendants' actions in limiting and delaying TWA's jet fleet and in leasing jets to TWA on unlawful conditions were in furtherance of their conspiracy to restrain and monopolize and their attempt to monopolize the supply of aircraft to commercial air carriers in violation of the antitrust laws (Complaint, pars. 7, 9, 10, 14-20, 22, 24, 49-51, 52(a), A-3-4, A-8-10, A-15, A-23-25).

In computing TWA's damages for its injuries from these antitrust violations, the Special Master deducted from this $74.3 million of proven losses in operating profits a total of $29 million to reflect the cost which TWA would have incurred in raising sufficient capital funds to purchase the additional 16 jets, to acquire the full 63-plane fleet earlier, and to purchase rather than lease from Toolco the planes received in 1959-1960 (Brownell Report, pp. 147-67, 183-85, 319-20; A-1966). Since the deduction was made from the earnings which the Special Master had determined TWA lost (*i.e.*, before trebling), the effect of this deduction was to reduce TWA's overall recovery by $87 million.

TWA accepts the logic and propriety of making a "cost of capital" deduction from the gross damage award pursuant to the principle approved by this Court in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 504 (1968), but believes the principle was misapplied in this case. In *Hanover Shoe,* where the damages stemmed from the plaintiff's having been unlawfully required to lease machinery which would have been cheaper to buy, an interest charge of 2.5 per cent on the assumed purchase price of the machinery was deducted from the amount of the award. In this case, where the damages stemmed from being denied capital equipment as well as being required to lease rather than own such equipment, the same principle was applied by the Special Master and approved by the courts below (308 F.Supp. at 694, A-2054-55; 449 F.2d at 79-80, A-2793-94).

The specific cost of capital which the Special Master fixed, however, was based on assumed interest rates of 6 per cent and 6.3 per cent. He derived these rates from the interest rates incurred by airlines generally for borrow-

ings negotiated in the 1958-1960 period, with particular reference to the rates available to TWA in 1959-1960 (Brownell Report, pp. 158-59; A-1966). Yet the complaint specifically alleges that, in furtherance of and as a part of their conspiracy to restrain and monopolize and their attempt to monopolize aircraft supply, defendants prevented TWA from arranging financing in 1955 and 1956 when interest rates were very substantially lower, ranging from 4 per cent to 4¾ per cent (Complaint, pars. 7, 9, 10(g), 23, 26, 27, 28, 52(c), A-3-4, A-8-10, A-15-16, A-25). The Special Master expressly found these allegations to be well-pleaded, and summarized what he considered to be their essential elements in his own language:

> "It may be helpful once again to restate below in summary form the essence of these allegations as follows:
>
> "1. For the purpose of creating and maintaining control of the business of financing the purchase of aircraft for use by TWA and strengthening control over the acquisition of aircraft by TWA, the defendants rendered TWA dependent upon them for such assistance in financing as defendants might choose to provide, refusing to allow equity financing by TWA except on condition that as a result Toolco would increase its equity position in TWA and causing TWA instead to obtain funds chiefly by means of debt financing, thus rendering TWA unable to seek financing needed for the acquisition of aircraft except upon the approval of defendants. The actions complained of commenced subsequent to the acquisition by Toolco of a stock interest in TWA and the action continued throughout the period covered by the complaint. (Par. 23).*

"* Toolco first acquired stock of TWA in 1939 (6 CAB 153, 154) and continued its actions until December 31, 1960.

"2. From 1955 until December 1960 defendants dictated the type and manner of acquiring aircraft and the manner of financing the acquisition of aircraft. (Par. 24).

"3. At least as early as 1955 United States air carriers recognized the needs for the extensive financing required for the acquisition of jet powered aircraft. (Par. 25).

"4. In 1955 and continuously thereafter until December 1960 defendants directed TWA to make no efforts itself to obtain financing necessary for the acquisition of jets required for TWA needs. (Par. 26).

"5. Commencing in 1955 and continuing thereafter various other air carriers, including TWA competitors, made appropriate arrangements for the financing of jet aircraft, and in 1955 and in 1956 obtained commitments for funds at interest rates ranging from 4% in 1955 to 4¼%-4¾% in 1956. (Par. 27).

"6. In 1955, and for several years thereafter defendants discussed various proposals for financing TWA jet aircraft, but made no arrangements for such financing, nor was TWA allowed to make any such arrangements until December 1960, when interest rates for long-term debt were approximately 6-6½% (Par. 28); and

"7. TWA was foreclosed from obtaining financing on more advantageous terms than those available to it in December 1960 and thereby suffered a loss because of the greater cost of borrowing and TWA's ability to obtain financing for its needs was substantially impaired. (Par. 52(c) and (d)).

"The well pleaded allegations restated above * * * are accepted as facts * * * ." (Brownell Report, pp. 254-55; A-1966)

The Special Master held, however, that TWA had not met its burden of showing that it had suffered losses in any specific amount in connection with the financing of its jet fleet (Brownell Report, pp. 258 *et seq.*, 322; A-1966).

TWA does not contest the fact that—as the Special Master determined—in 1958-1960 TWA would have had to pay 6 to 6.3 per cent interest. This is approximately what it did pay at about that time.

In 1955 and 1956, however, TWA would have paid 4 to 4¾ per cent. Those figures are established by the complaint and fairly reflect the rates paid by other airlines which, unlike TWA, arranged financing in those years (AX-1776-77). TWA believes that the Special Master (who accepted these figures) should have given recognition to them in his selection of a "cost of capital" factor to apply in determining the net amount of the losses in operating profits which resulted from defendants' misconduct.

Charging TWA with 6 per cent and 6.3 per cent interest in a "cost of capital" deduction produces an inequitable result as can be seen in the extraordinary difference between TWA's historical interest costs and the interest costs which other airlines, which had arranged for their borrowings earlier, were in fact paying during the 1960-1963 period for their overall debt. TWA Ex. 314 (AX-1060 *et seq.*) sets out the weighted average interest rates on all outstanding external debt, as of December 31 of each of the years 1960-1963, for TWA and each of its three principal competitors—Pan American World Airways, Inc. ("PAA"), American Airlines, Inc. ("AAL"), and United Air Lines, Inc. ("UAL"):

Weighted Average Interest Rates on Debt Outstanding at December 31, 1960-1963

	TWA	*PAA*	*AAL*	*UAL*
1960	6.27%	4.67%	4.32%	4.27%
1961	6.27	4.88	4.67	4.38
1962	6.21	4.87	4.65	4.25
1963	6.27	4.74	4.68	4.41

Of the four largest American-flag airlines, *only* TWA found itself, at the close of the Hughes-Toolco regime, with an operative interest rate in excess of 6 per cent. The amounts to which the low interest rates of its competitors were applicable were in all respects comparable to the amounts on which TWA was compelled to pay interest rates so strikingly higher (*see, e.g.*, TWA Ex. 313, AX-1051 *et seq.*). This is the very "loss by virtue of the greater cost of borrowing" pleaded in paragraph 52(c) of the complaint (A-25). For that to become the basis for a deduction from the damage award to TWA is to allow defendants to profit by their own wrongdoing. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

If the Special Master had used 4¾ per cent (no higher rate is justifiable in light of the express allegations of the complaint admitted by the default and the demonstrated interest costs of TWA's competitors during the same period of time) instead of 6 per cent and 6.3 per cent, the cost of capital which he computed would have been $22.5 million instead of $29.0 million, and the damages found would have been increased by $6.5 million. Since the Special Master set out his actual computations in his Report, where they appear at pp. 161-62, 164-66 and 185 (A-1966), the results of such a change in the assumed interest rate are simple to determine: in Annex B to this brief we have set out the required changes

in the Special Master's computations, showing the $6.5 million difference. After trebling the result would be to increase TWA's judgment by $19.5 million.

IV.

The decisions below improperly interpreted the provision for recovery of "cost of suit" in Section 4 of the Clayton Act to exclude the expense necessarily incurred by TWA when it retained expert witnesses to assist in proving the amount of its damages.

Section 4 of the Clayton Act provides that a successful private antitrust plaintiff

> "* * * shall recover threefold the damages by him sustained, *and the cost of suit, including a reasonable attorney's fee.*" (Emphasis added.)

Like the permissible composition of the damage award discussed in Point I above, the meaning of the phrase "cost of suit" presents a question of statutory interpretation—one upon which this Court has not had occasion to pass. In the absence of a definitive construction by this Court, the lower federal courts have interpreted "cost of suit" as meaning only "taxable costs."

As the instant case strikingly demonstrates, proving damages in a major private antitrust case has become not just time-consuming, but complex, sophisticated and correspondingly very costly. When the damages suffered by a plaintiff are required to be measured in terms of profits lost over a period of many years (the Special Master and the district court rejected any simpler approach to fixing TWA's damages[15]), the measurement of those profits as a practical matter can only be made with

[15] Brownell Report, pp. 302-08 (A-1966); 308 F.Supp. at 694 (A-2053-54). The district court did, however, state that TWA's Comparative Profit Study (AX-80 *et seq.*) had a "reasonable basis" (312 F.Supp. at 483, A-2068).

the participation of experts. *See* N. Leonard, *The Measurement of Damages: An Economist's View*, 31 OHIO ST. L.J. 687, 698-99 (1970). Even in a less complex case, a plaintiff who did not present accounting testimony, for example, would run an obvious risk of having failed to establish the amount of his loss.

TWA's total claim for its cost of this suit, exclusive of attorney's fee, was $2,230,602.83. The district court limited its recovery to an award of "taxable costs" in the amount of $336,705.12 (312 F.Supp. at 485, A-2071-72, A-2073). Again, as it did in the court of appeals in order to simplify presentation of the issue, TWA here confines its claim in excess of the amount recovered as taxable costs to the fees and disbursements which it had to pay for the services of firms and individuals retained as experts in connection with the damage hearing—a total of $1,642,677.71.[16] The

[16] The breakdown of the fees as to each firm of experts is as follows:

Coverdale & Colpitts consulting engineers		
Fees	$569,810.23	
Disbursements	41,023.13	610,833.36
Drexel Harriman Ripley, Inc. investment bankers		
Fees	$257,250.00	
Disbursements	784.33	258,034.33
Price Waterhouse & Co. independent public accountants		
Fees	$464,600.00	
Disbursements	32,267.76	$ 496,867.76
R. Dixon Speas Associates aviation consultants		
Fees	$234,206.00	
Disbursements	42,736.26	276,942.26
		$1,642,677.71

The disbursements of R. Dixon Speas Associates included fees paid to expert consultants on statistics (including Professor Van Court M. Hare, Jr.) totalling $17,793.08.

affidavits submitted by TWA to demonstrate that it had actually made these expenditures and that they were reasonably necessary to the prosecution of TWA's claims (Docs. 520, 524) were not contested by the defendants in the district court.[17]

The sole reason for the denial by the courts below of reimbursement to TWA for these expenditures was that,

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[17] The role played by each expert may be briefly described. *Edward L. Wemple,* a partner in the consulting engineering firm, Coverdale & Colpitts, presented reports by his firm to demonstrate the amount by which TWA's operating revenues and profits had been decreased through failure to receive all of its 63-plane jet fleet in the manner and on the time schedule it would have followed had it not been for defendants' unlawful intervention (AX-80 *et seq.*, AX-91 *et seq.*, AX-167 *et seq.*). *Edward J. Morehouse,* Senior Vice President of the investment banking firm, Drexel Harriman Ripley, Inc., presented a report stating his opinion and that of his firm that a non-captive TWA could have financed the purchase of its full 63-plane jet fleet at very much lower costs than those in fact incurred in the later financial arrangements eventually dictated by defendants for the cut-back fleet, and describing in detail a particular program which he and his firm would have recommended as "do-able" at the time (AX-336 *et seq.*, AX-430 *et seq.*). *R. Dixon Speas,* President of R. Dixon Speas Associates, submitted a report estimating the financial loss suffered by TWA as a result of delays in the sale of its piston engine aircraft (TWA Ex. 6(b)). *John C. Biegler,* a partner in Price Waterhouse & Co., independent public accountants, presented a report which restated and compared TWA's historical financial statements during the damage period with those which it would have reported except for the various matters complained of, adjusting and combining all of the other expert studies on the basis of a consistent set of assumptions and following in all material respects the accounting methods which were historically employed by TWA and its independent accountants during the years in question (AX-452 *et seq.*, AX-480 *et seq.*). Price Waterhouse also prepared supplementary accounting studies that were admitted into evidence and relied upon by the parties and the Special Master as accurately reflecting the financial effects of the conflicting assumptions of the experts for each side (Brownell Report, pp. 58-59, 81-83, 142-43; A-1966). Statistical experts, including *Van Court M. Hare, Jr.,* assisted in the analysis of defendants' expert testimony, and Professor Hare testified in rebuttal on certain statistical matters (A-1773 *et seq.*).

under a line of circuit and district court cases stemming from the Second Circuit's decision in *Straus* v. *Victor Talking Machine Co.*, 297 F. 791, 806-07 (1924), such reimbursement has been denied. The district court felt bound by these precedents (312 F.Supp. at 485, A-2071), and the court of appeals declined to overrule the *Straus* case (449 F.2d at 81, A-2798). Therefore, it remains for this Court, which has never passed upon the question, to give a definitive interpretation of the phrase "cost of suit" in Section 4 of the Clayton Act in order to effectuate fully the congressional policy embodied in it in light of the realities of today's private antitrust suit.

Although federal courts do not tax as court costs even a part of the actual out-of-pocket expenses for necessary expert witnesses, a number of state statutes recognize their importance by including all or part of the expenses of hiring experts within taxable costs.[18] However, in a private antitrust case it is not necessary to expand the type of litigation expenses now comprehended by ordinary taxable costs. Congress has expressly provided for the recovery of the "cost of suit," and all that is necessary is to give that provision its natural meaning.

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[18] *See, e.g.*, Title 16, ME. REV. STAT. ANN. § 251 (Supp. 1972) (amended in 1971, eliminated $50 per diem limit to permit "a reasonable sum for each day's attendance of any expert witness"); N.H. REV. STAT. ANN. § 525:14-a (Supp. 1971) (amended in 1971 to allow "actual costs" for expert witness fees); FLA. STAT. ANN. § 90.231 (West 1960) (expert witness fee, "including the cost of any exhibits used by such witness in the amount of ten dollars per hour or *such amount as the trial judge may deem reasonable* • • • shall be taxed as costs.") (emphasis added); Title 10, DEL. CODE ANN. § 8906 (1953) ("[F]ees for witnesses testifying as experts • • • shall be fixed by the court in its discretion, and • • • taxed as part of the costs"). *See also* LA. REV. STAT. ANN. § 13:3666 (West 1968); N.C. GEN. STAT. § 7A-314 (Supp. 1971); N.D. CENT. CODE § 28-26-06(5) (Supp. 1971); WYO. STAT. ANN. § 1-195 (Supp. 1971).

By doing so in the present case, this Court will not only give recognition to the present-day importance of such expert witnesses in private antitrust suits,[19] but will also effectuate the congressional purpose underlying Section 4 of the Clayton Act in a most practical way. Where Congress has intended that a policy of national importance is to be enforced by those who have been directly injured by the proscribed conduct, this Court has recognized that it should liberally construe provisions allowing recovery of the expense of suit in order that such persons will be encouraged to seek judicial relief. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Such an approach is equally applicable to a private antitrust action, for as this Court has very recently made clear, the purpose of allowing the recovery of cost of suit in Section 4 is not only to encourage but to make economically feasible the bringing of private antitrust actions. In *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 266 (1972), this Court responded as follows to the State of Hawaii's argument that it should be permitted to bring an antitrust suit *parens patriae* on behalf of all of its citizens because individual citizens were not financially able to bring such a suit on their own behalf:

"Congress has given private citizens rights of action for injunctive relief and damages for antitrust viola-

[19] Recognition of the importance of expert witnesses generally is already expressed by this Court in the adoption of the 1970 amendments to the Federal Rules of Civil Procedure. Thus Rule 26(b)(4)(C), as amended, not only provides that a party seeking discovery from another party's expert witness must pay a reasonable fee for the expert's time in responding to discovery, but also that if such discovery extends to the facts known or opinions reached by the expert, the party seeking discovery must pay a fair portion of the other party's reasonable fees and expenses in obtaining such facts or opinions from the expert.

> tions without regard to the amount in controversy. 28 U.S.C. § 1337; 15 U.S.C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions which may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. • • • The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits."

The fees paid to experts for which the lower courts have refused TWA recovery were plainly part of the "costs of the litigation" to TWA.

That TWA should recover its cost of expert witnesses is, we believe, firmly within the equity and policy of the statute. Furthermore, we believe the language of the statute is entirely consistent with the equity and policy we urge, while the contrary analysis of Section 4 in *Straus* v. *Victor Talking Machine Co., supra,* is strained and unpersuasive.

The language of Section 4 of the Clayton Act derives from Section 7 of the Sherman Act (now repealed)[20] from which it differs solely in the substitution of the singular "cost of suit" for the plural "costs of suit". In *Straus* the court commented that this difference was probably accidental (297 F. at 806-07). Yet in a different context, but roughly contemporary with passage of the Clayton Act, legal significance was ascribed to the use of "cost" instead of "costs." In *Hygienic Chemical Co.* v. *Provident Chem-*

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[20] Act of July 2, 1890, ch. 647, Sec. 7, 26 STAT. 210. *repealed,* Act of July 7, 1955, ch. 283, 69 STAT. 283, eff. January 7, 1956.

ical Works, 176 F. 525, 527-28 (2d Cir. 1910), the court in construing an agreement to share the cost and expense of defending a patent suit, stated:

> "The words 'cost' and 'costs' do not always mean the same thing. The word 'cost' and the phrase 'taxable costs' generally have quite different meanings. 'Cost' may be considered as synonymous with 'expense'. 'Taxable costs' are allowances made to the successful party to reimburse him for his disbursements made in prosecuting or defending a suit." [21]

The court in *Straus* placed its principal reliance on the argument that, because the language of both statutes was followed by the phrase "including a reasonable attorney's fee", Congress could not have intended to mean the *expenses* of suit, since such expenses would automatically include the attorney's fee (297 F. at 807). This, however, is a misreading of the words that Congress used.

The important word in this analysis is "including." It evidences the fact that Congress regarded the phrase "cost

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[21] *Accord: Munro* v. *Maryland Casualty Co.*, 48 Misc. 183, 187, 96 N.Y.S. 705, 707 (Sup. Ct. N.Y. Co. 1905) ("To defend at its cost means to bear the burden of the litigation, to defray the expense of carrying it on. 'Cost' and 'costs' are not synonymous."). *See also Hutchinson* v. *Hutchinson,* 223 Cal.App.2d 494, 36 Cal. Rptr. 63 (1st Dist. 1963), where the court construed CAL. CIV. CODE § 4370(a) (West Supp. 1971), which provides that in a matrimonial proceeding a party may be ordered to pay "such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding * * * ." The court, affirming an award of a reasonable fee for the services of a private investigator whom the wife had employed, analyzed the pertinent statutory language as follows:

> "Quite obviously, the reference to 'the cost of maintaining or defending the action' means something other than and in addition to attorney's fees. Also, such a cost means something other than and in addition to what are referred to as 'costs and necessary disbursements in the action.'" (36 Cal. Rptr. at 71)

of suit" as *including* within its meaning "a reasonable attorney's fee." The rule that ordinary taxable costs *never* include an attorney's fee was well-settled long before the enactment of either the Sherman Act or the Clayton Act. *Flanders* v. *Tweed,* 15 Wall. 450, 452-53 (1872); *Day* v. *Woodworth,* 13 How. 362, 372-73 (1851). *See* 28 U.S.C. § 1920 (1970); 6 J. MOORE, FEDERAL PRACTICE ¶ 54.70[1], at 1301 (2d ed. 1971). Since Congress may be presumed to have been aware that "taxable costs" do not include an attorney's fee, it must have intended the phrase "cost of suit" chosen in Section 4 to mean something more than the ordinary "taxable costs" recoverable by the successful party in any lawsuit. Otherwise the phrase used would have been "costs *and* a reasonable attorney's fee."

The practical effect of the construction in *Straus* is to treat the entire reference to "cost of suit" in Section 4 as mere surplusage. The principle that taxable costs follow the result as of course in actions at law in federal courts was well settled at the time the Sherman Act was enacted. *Ex parte Peterson,* 253 U.S. 300, 317-18 (1920) (reviewing the early practice); *United States* v. *Schurz,* 102 U.S. 378, 408 (1880) (Supplemental Opinion); *Trinidad Asphalt Paving Co.* v. *Robinson,* 52 F. 347, 349-50 (E.D. Mich. 1892). There was no need for Congress to provide that a successful treble damage plaintiff should recover taxable costs. He would get those under the prevailing practice in any event.

Therefore, grammatically and logically the language chosen points to a conclusion opposite to the one reached in *Straus*—that Congress intended the entire expense of suit, including specifically an attorney's fee, to be recoverable.

Conclusion

It is respectfully submitted that the judgment below should be modified to increase the amount to be recovered by cross-petitioner TWA as follows:

A. Interest as damages from December 31, 1963 to entry of judgment (Point I) [see also Annex A]	$38,888,991.78
(or, alternatively)	
Interest from filing of Brownell Report to entry of judgment (Point II)	15,962,926.57
B. Increase to reflect lower "cost of capital" (Point III)	19,500,000.00
C. Including TWA's expenses for experts in "cost of suit" (Point IV)	1,642,677.71

and as modified should be affirmed.

Respectfully submitted,

DUDLEY B. TENNEY
80 Pine Street
New York, New York 10005
Counsel for Cross-Petitioner, Trans World Airlines, Inc.

Of Counsel:

JAMES WM. MOORE
54 Meadow Street
New Haven, Connecticut 06515

PAUL W. WILLIAMS
IMMANUEL KOHN
MARSHALL H. COX, JR.
CAHILL, GORDON, SONNETT, REINDEL & OHL
80 Pine Street
New York, New York 10005

ANNEX A

If this Court finds that TWA is entitled to have its damages increased by $6.5 million before trebling to give effect, in deducting its "cost of capital", to the lower interest rates, as alleged in the complaint, at which TWA would have financed its full 63-plane jet fleet but for defendants' wrongdoing (Point III *supra*), then TWA's total damages before trebling will be increased to $52,370,478.65. This will result in an increase in the total amount of prejudgment interest to which TWA would be entitled under the computation set forth on p. 22 of Point I *supra*, which can be shown as follows:

TWA's proven losses:	$52,370,478.65
rate of interest:	.045
number of years (12/31/63 to 4/14/70):	6.28
$52,370,478.65 × .045 × 6.28 =	$14,799,897.26
	× 3 (trebling)
	$44,399,691.78

ANNEX B

COST OF CAPITAL

In his Report the Special Master describes in detail the procedures which he followed in determining the "cost of capital," commencing at p. 148 and continuing through the detailed calculations in the tables appearing at pp. 161-62 and 164-66 that are labeled as Calculations A through E (A-1966). With respect to the jets which TWA was required to lease through 1960, instead of being able to buy them for itself, a brief additional computation is contained in the Brownell Report at p. 185 (A-1966). This Annex will describe the principal elements of those computations, and how the Special Master made them.

His method is simple and appropriate. TWA's objection is that "cost of capital" should not employ an interest rate in excess of 4¾ per cent. The effect on the award of a change in the interest rates is shown in the revised computations appearing hereafter.

The 63-plane jet fleet, which TWA would have had but for defendants' wrongdoing, can be divided for this purpose, as it was for the purpose of the basic operating studies on which the award of damages was based, into four classifications, which for this purpose the Special Master labeled (A), (B), (C) and (D).

(A) Six B-331 aircraft were diverted to Pan American by defendants so that TWA never did receive them.

(B) Ten CV-880 aircraft were diverted by defendants, who assigned six to Northeast and, initially, retained the other four. (These four were later leased to Northeast for a number of years but then reverted to Toolco's possession.)

(C) Of the 33 Boeing aircraft involved, 28 (11 B-131s and 17 B-331s) were delayed in delivery for an aver-

age of 1.63 months, or .1354 of a year, as the result of defendants delaying the placement of jet orders in 1955. (This includes the six diverted B-331s covered by (A) above, since under (A) there is considered only the period of operation following delivery to Pan American, and not the pre-delivery delays.)

(D) Of the 20 CV-880 aircraft received by TWA, 19 were delayed in delivery for an average of 7.74 months or .6450 of a year as a result of defendants' conduct.

The Special Master's computations are perhaps most easily understood if (C) and (D) are considered first.

The extent of the delays in delivery for the Boeing and Convair fleets in fact received by TWA had been determined by the Special Master at an earlier point in his Report, based on the testimony of Robert W. Rummel, TWA's Vice President, Planning and Research, and the principal expert on equipment matters for both TWA and Toolco throughout the relevant period, and John B. Connelly, Vice President and Assistant General Manager of the Boeng Company —Aircraft Division and a member of Boeing's "headquarters group" during the negotiations with airlines for the sale of early jet aircraft, and a review of the other evidence (Brownell Report, pp. 52, 87, 141, 151-53; A-1966). For "cost of capital" purposes any assumed interest rate was therefore applicable only for these specific periods of delay (Brownell Report, pp. 154-55; A-1966). The amount on which interest should be computed was considered to be the *total* cost of the planes in question, together with all related spare parts and equipment. This cost had been computed and furnished to the Special Master by Price Waterhouse & Co. and had been accepted by defendants' expert (Brownell Report, pp. 149-50, 154-55; A-1966). The calculations with respect to sections (C) and (D) were thus simple.

With respect to those aircraft that TWA did not in fact receive, covered under (A) and (B), interest was imposed for a much longer period—the entire portion of the 1959-1963 damage period during which TWA was deprived of the aircraft. The *amounts* to which the interest rate was applied were available to the Special Master through the computations of Price Waterhouse & Co., which had computed the depreciation charge for each year in order to deduct it from the claims for lost operating profit. Price Waterhouse & Co. thus developed and presented as part of its reports the necessary information on "adjusted capital investment" for each segment of the fleet as of the end of each calendar year throughout the period. The Special Master determined that funds would be needed in advance of the actual delivery dates, and consequently he charged TWA with interest on one-third of the total investment in each fleet commencing a little over one month prior to the first delivery of an airplane in that fleet, with interest on the second third commencing to accrue three months later, and interest on the final third commencing to accrue after an additional three months. Thus assumed interest was charged to TWA on the entire assumed investment for "cost of capital" purposes well in advance of the time when TWA was assumed to have received its final deliveries (Brownell Report, pp. 149-50; A-1966).

The computations required to implement this direct and straightforward approach are quite easy to follow. Reproduced below are the tables that appear at pp. 161 through 166 of the Brownell Report (A-1966), exactly as such tables appear in the Report except that each figure which would be different if the calculation had been made using a 4¾ per cent interest rate has been *italicized,* and next to it is printed **[in bold-face type and in brackets]** the different figure that would result from using the 4¾ per cent rate to make the same calculation.

CALCULATION A

Interest Cost 1959-1963

Adding Six B-331 Aircraft
($ millions)

	(1) Adjusted Capital Investment Beginning of Period	(2) Less Depreciation and Amortization for the Period[2]	(3) Adjusted Capital Investment End of Period	(4) Average Investment for the Period (1) + (3) ÷ 2	(5) Interest at 6.3 per cent [4¾]	(6) Interest Cost for the Period (4) × (5)
Fourth qtr. 1959	14.1[1]	—	14.4	14.4	*1½%*[3] [1 3/16%[3]]	*.216* [.171]
First qtr. 1960	28.8[1]	0.4*	28.4	28.6	*1½%*[3] [1 3/16%[3]]	*.429* [.340]
Second qtr. 1960	42.7[1]	1.1*	41.6	42.1	*1½%*[3] [1 3/16%[3]]	*.632* [.501]
Second half 1960	41.6	2.3*	39.3	40.5	*3%*[4] [2⅜%[4]]	*1.215* [.962]
1961	39.3	5.1	34.2	36.7	*6%* [4¾%]	*2.202* [1.743]
1962	34.2	4.3	29.9	32.0	*6%* [4¾%]	*1.920* [1.520]
1963	29.9	3.6	26.3	28.1	*6%* [4¾%]	*1.686* [1.335]
				Total increase in interest cost for period 1959-1963		*$8.300* [6.572]

* Proration of annual depreciation of $3.8 million.

[1] See (1)(a) above on page 150.

[2] Source: TWA Ex. 7(d).

[3] One-quarter of annual rate of *6 per cent.* [4¾ per cent.]

[4] One-half of annual rate of *6 per cent.* [4¾ per cent.]

CALCULATION B

Interest Cost 1960-1963

Adding Ten CV-880 Aircraft

($ millions)

	(1) Adjusted Capital Investment Beginning of Period	(2) Less Depreciation and Amortization for the Period[2]	(3) Adjusted Capital Investment End of Period	(4) Average Investment for the Period (1) + (3) ÷ 2	(5) Interest at 6.3 per cent [4¾]	(6) Interest Cost for the Period (4) × (5)
Second qtr. 1960	16.1[1]	.1*	16.0	16.1	*1.58%*[3] [1 3/16%[3]]	*.254* [.192]
Third qtr. 1960	32.0[1]	.6*	31.4	31.7	*1.58%*[3] [1 3/16%[3]]	*.501* [.377]
Fourth qtr. 1960	47.4[1]	1.3*	46.1	46.8	*1.58%*[3] [1 3/16%[3]]	*.739* [.557]
1961	46.1	5.7	40.4	43.3	*6.3%* [4¾%]	*2.728* [2.057]
1962	40.4	5.4	35.0	37.7	*6.3%* [4¾%]	*2.375* [1.791]
1963	35.0	4.4	30.6	32.8	*6.3%* [4¾%]	*2.066* [1.558]
Total increase in interest cost for period 1960-1963						*$8.663* [6.532]

* Proration of annual depreciation of $2.0 million.

[1] See (1)(b) above on page 150.

[2] Source: TWA Ex. 7(d) as amended by letter of Price Waterhouse to Cahill, Gordon of August 30, 1968, Note 2.

[3] One-quarter of annual rate of *6.3 per cent.* [4¾ per cent.]

CALCULATION C

Interest Cost 1958-1960

Earlier Purchase of Twenty-Eight Boeing Aircraft
($ millions)

	Cost of 11 B-131 Aircraft delayed[1]	56.8		
	Cost of 17 B-331 Aircraft delayed[1]	122.1		
a.	Total cost of earlier Boeing Aircraft		178.9	
	Less increase in depreciation as a result of the earlier purchase[2]		3.7	
b.	Net value of earlier investment		175.2	
c.	Average earlier investment		177.1	
	(a + b ÷ 2) × annual interest rate[3]		.06	[.0475]
	Increased interest cost for one year		*10.626*	[8.412]
	× average delay		.1354	
			$1.4388	[$1.1390]

[1] See determination page 154 above.
Source: TWA Ex. 7(b)2, VI, pp. 30, 32 and 35.

[2] Source: TWA Ex. 7(d).

[3] See page 158 above.

CALCULATION D

Interest Cost 1960-1961

Earlier Purchase of Nineteen CV-880 Aircraft
($ millions)

Cost of 19 Aircraft delayed[1]	$ 82.9	
Less increase in depreciation as a result of the earlier purchase[2]	$ 6.8	
Net value of earlier investment	$ 76.1	
Average earlier investment (a + b ÷ 2)	$ 79.5	
X Average annual interest rate[3]	*$ .063*	[.0475]
Increased interest cost for one year	*$5.0085*	[$3.7763]
X Average delay	.6450	
	$3.2305	[$2.4357]

[1] See determination page 155 of this report.
Source: TWA Ex. 7(b)2, VI, p. 46.

[2] Source: TWA Ex. 7(d) as amended by letter of Price Waterhouse to Cahill, Gordon of August 30, 1968, Note 2.

[3] See page 159 above.

CALCULATION E

Summary of Adjustments to Interest Cost
1958-1963
($ millions)

I. *Additional Purchase*		
Six B-331 Aircraft	*$ 8.300*	[$ 6.572]
Ten CV-880 Aircraft	*8.663*	[6.532]
	$16.963	[$13.104]
II. *Earlier Purchase*		
Eleven B-131 Aircraft and Seventeen B-331 Aircraft	*$ 1.439*	[$ 1.139]
Nineteen CV-880 Aircraft	*3.231*	[2.436]
	4.670	[3.575]
Total	*$21.633*	[$16.679]

The total effect of the foregoing changes would be to decrease the sum subtracted from the award—*i.e.*, to increase the award—by $4.9 million (before trebling).

Leasing

The Special Master's application of the "cost of capital" approach to the jets which were required to be leased by TWA in 1959 and 1960, instead of owned, is described in the Brownell Report at pp. 184-85 (A-1966). Since the same method is employed it requires no additional explanation. The calculation below is reproduced from p. 185 of the Report, with those figures *italicized* which are affected by a change to 4¾ per cent in assumed interest rates; next to each italicized figure is printed **[in bold-face type and in brackets]** the different figure that would result from using the 4¾ per cent rate in the calculation.

Determination of Separate Net Damage Resulting From Leasing Rather Than Owning Jet Aircraft

Year	(1) Average Additional Investment in Jets (Net Book Value)	(2) Assumed Interest Rate on Borrowed Funds	(3) Cost of Capital to Own Jets (1) × (2)	
1959	$51.3 million[1]	6% [4¾%]	*$3.1* million	[$ 2.4]
1960	$72.1 million[1]	6% [4¾%]	*4.3* million	[3.4]
	Total		*7.4* million	[5.8]

	($ millions)	
TOTAL RENTALS JET AIRCRAFT 1959-1960	24.2	
Add		
HISTORICAL INCREASE IN DEPRECIATION AND AMORTIZATION COSTS IN 1961-1963 OVER RECONSTRUCTED COSTS[2]	1.4	
	25.6	
Less		
DEPRECIATION AND AMORTIZATION 1959-1960	(12.9)	
COST OF CAPITAL—(3) above	(*7.4*)	[(5.8)]
	(*20.3*)	[(18.7)]
TOTAL NET LOSS BY REASON OF LEASING RATHER THAN OWNING	*$5.3*	[$6.9]

[1] Simat Report, Dx 271A IX-B-3-4.

[2] Price Waterhouse Report, TWA Ex. 7(d).

The effect of this change would be to decrease the sum subtracted from the award—*i.e.*, to increase the award—by $1.6 million (before trebling).

Effect on award

The "cost of capital" deductions from TWA's damage award made by the Special Master totalled $29.0 million ($21.6 million as shown in Calculation E at p. 8b *supra*, plus $7.4 million as shown in the calculation at p. 10b *supra*). If the interest rate used in making the calculations had been 4¾ per cent, the "cost of capital" deductions from TWA's damage award would have totalled $22.5 million ($16.7 million as shown in Calculation E at p. 8b *supra*, and $5.8 million as shown in the calculation at p. 10b *supra*).

The result of using a 4¾ per cent rate to calculate "cost of capital" would thus be to increase the damage award to TWA by $6 5 million (before trebling), and by $19.5 million after trebling.